160 U.S. 546

TRANSCRIPT OF RECORD.

160-546

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~1119.~~ 638 325

BENJAMIN H. JOHNSON, APPELLANT,

vs.

THE UNITED STATES AND THE UTE TRIBE OR NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 8, 1894.

(15,503.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 8, 1894.

1 In the Court of Claims.

BENJAMIN H. JOHNSON *v.* THE UNITED STATES and THE UTE TRIBE OR NATION OF INDIANS.	No. 2672. Indian Depredations.

I.—*Petition.*

The original petition in this case was filed June 20, 1891. Subsequently, to wit, on the 17th day of November, 1893, an amended petition, on motion of claimant and by leave of court, was filed to stand for and in lieu of the former petition, and which is as follows:

Amended Petition. Filed Nov. 17, 1893.

To the honorable judges of the Court of Claims:

Your petitioner, Benjamin H. Johnson, a resident of Scipio, Millard county, in the Territory of Utah, and a citizen of the United States, respectfully shows:

That he was not a citizen of the United States on or about the 10th day of June, 1866, the date of the loss hereinafter described, not having taken out his final citizenship papers until 1873.

That he moved to the United States in 1848, when he was 13 years old, and has resided here ever since, and was a citizen of the United States at the date of the passage of the Indian depredation law of March 3, 1891. 26th Stat. L., chapter 538, p. 851.

2 That it is admitted in allowing claims for Indian depredations under the act of March 3, 1885, chapter 341 (1 Sup. R. S., 2d ed., p. 913, note), it has been the practice of the Interior Department to interpret the words "citizens of the United States," therein used, as meaning only those who were citizens or had declared their intention to become citizens at the time the depredations were committed, and such citizenship was found when neither alleged nor testified to where the contrary did not appear.

That on or about the 10th day of June, 1866, in the county of Millard, near the town of Scipio, in the Territory of Utah, the following-described property belonging to Benjamin H. Johnson, to wit:

	Value.
2 gray horses, $125 each	$250 00
1 brown horse	150 00
2 three-year-old mares, $75 each	150 00
1 roan mare	100 00
One yellow mare	125 00
26 range cows & calves, $50	1,300 00
4 yoke of work oxen, at $150 ger poke	600 00
6 three-year-old steers, $55 each	330 00
10 two-year-old steers, $40 each	400 00
6 four-year-old steers, $60 each	360 00
10 yearlings, $25 each	250 00
Total	$4,015 00

was taken from and out of his possession without his consent by Indians of a band, tribe, or nation in amity with the United States, and known as the Ute Indians, without just cause or provocation on the part of the owner or the agent in charge, with the intent to and did then and there deprive him of the use and value of all said property, nor was said property or any part thereof ever returned or paid for.

That this claim was never presented to the Commissioner of Indian Affairs nor to Congress nor any agent nor department of the Government.

Petitioner avers that no assignment or transfer of said claim or any part thereof or right, title, or interest therein has been made, and that he is the lawful owner thereof and justly entitled to the amount herein claimed after allowing all just credits and set-offs.

Wherefore your petitioners prays judgment against the defendants "upon the facts and the law" for four thousand and fifteen dollars ($4,015.00), and that the lawful fees and expenses be allowed therefrom to his attorney of record for prosecuting this claim, and that your petitioner may have such further relief in the premises as the nature of his case shall require and to this honorable court shall seem meet.

BENJAMIN H. JOHNSON,
By his attorney, JOHN WHARTON CLARK.

3 DISTRICT OF COLUMBIA, *ss:*

Before me, Emma M. Gillett, a notary public in and for the District of Columbia, personally appeared John Wharton Clark, who, being duly sworn according to law, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney duly executed by said petition and filed herewith to verify said petition, and petitioner is justly entitled to the amount therein claimed after allowing all just credits and set-offs, and that the facts herein stated are true to the best of his knowledge and belief.

JOHN WHARTON CLARK.

Subscribed and sworn to before me this 15th day of November, eighteen hundred and ninety-three.

[SEAL.] EMMA M. GILLETT,
Notary Public.

Petitioner's post-office address is Scipio, Utah.

4 II.—*Motion to Dismiss Petition. Filed November* 29, 1893.

In this cause come the defendants and move that the same be dismissed for the reason that it appears in the petition itself that the claimant was not a citizen of the United States at the time of the depredation alleged to have been committed, and the court has not therefore jurisdiction to entertain the same.

CHARLES B. HOWRY,
Ass't Att'y General.

WM. H. ROBINSON, *Ass't Att'y.*

I acknowledge service of notice of this motion and receipt of copy of same.

JOHN WHARTON CLARK,
Att'y for Claimant.

November 29, 1893.

5 III.—*Opinion of the Court.*

RICHARDSON, *Ch. J.*, delivered the opinion of the court:

The claimant presented the following petition:

To the honorable judges of the Court of Claims:

Your petitioner, Benjamin H. Johnson, a resident of Scipio, Millard county, in the Territory of Utah, and a citizen of the United States, respectfully shows:

That he was not a citizen of the United States on or about the 10th day of June, 1866, the date of the loss hereinafter described, not having taken out his final citizenship papers until 1873.

That he moved to the United States in 1848, when he was thirteen years old, and has resided here ever since, and was a citizen of the United States at the date of the passage of the Indian depredation law of March 3, 1891 (26 Stat. L., chap. 538, p. 851).

That it is admitted in allowing claims for Indian depredations, under the act of March 3, 1885, chapter 341 (1 Supp. R. S., 2d ed., p. 913, note), it has been the practice of the Interior Department to interpret the words "citizens of the United States," therein used, as meaning only those who were citizens, or who had declared their intention to become citizens, at the time the depredations were committed, and such citizenship was found when neither alleged nor testified to where the contrary did not appear.

That on or about the 10th day of June, 1866, in the county of Millard, near the town of Scipio, in the Territory of Utah, the following-described property belonging to Benjamin H. Johnson, to wit:

2 gray horses, $125 each	$250 00
1 brown horse	150 00
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26 range cows and calves, $50	1,300 00
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6 four-year-old steers, $60 each	360 00
10 yearlings, $25 each	250 00
Total	4,015 00

was taken from and out of his possession without his consent by Indians of a band, tribe, or nation in amity with the United States,

and known as the Ute Indians, without just cause or provocation on the part of the owner or the agent in charge, with the intent to, and did then and there, deprive him of the use and value of all said property, nor was said property, or any part thereof, ever returned or paid for.

That this claim was never presented to the Commissioner of Indian Affairs nor to Congress nor any agent nor department of the Government.

Petitioner avers that no assignment or transfer of said claim, or any part thereof, or right, title, or interest therein has been made, and that he is the lawful owner thereof, and justly entitled to the amount herein claimed after allowing all just credits and set-offs.

6 Wherefore your petitioner prays judgment against the defendants, "upon the facts and the law," for four thousand and fifteen dollars ($4,015.00) and that the lawful fees and expenses be allowed therefrom to his attorneys of record for prosecuting this claim, and that your petitioner may have such further relief in the premises as the nature of his case shall require and to this honorable court shall seem meet.

To this the defendants file a motion to dismiss for want of jurisdiction, as follows:

In this cause come the defendants, and move that the same be dismissed, for the reason that it appears in the petition itself that the claimant was not a citizen of the United States at the time of the depredation alleged to have been committed, and the court has not, therefore, jurisdiction to entertain the same.

The act of March 3, 1891 (ch. 538), under which the action is brought, so far as it affects the question now under consideration, is as follows (1 Supp. R. S., 2d ed., p, 913):

Be it enacted, etc., That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

The citizenship of the claimant is thus made a jurisdictional fact, and if it does not appear the court cannot proceed to hear the case on its merits. The petition alleges that the claimant was a citizen of the United States when the act of March 3, 1891, was passed, but not when the depredations were committed, though he had previously declared his intention to become such. (Rev. Stat., sec. 2165, "First.")

This raises the single question whether or not a claimant must have been a citizen of the United States at the time the depredations complained of under the act were committed in order to entitle him to any standing in court.

The same question arose in the case of Volk, executor, etc., *v.* The United States (28 C. Cls R., 241) and is not free from doubt. We repeat substantially what we said in that case.

It is evident that the whole of this paragraph relates to but one point of time, and that period was when the depredation was committed. It never has been questioned, and nobody can doubt, that it was the amity of the band, tribe, or nation at that time which must be proved.

The words citizens of the "United States" and "Indians belonging to any band, tribe, or nation in amity with the United States" are so closely connected in the same paragraph, that they must refer to the same point of time.

The status both of the Indians as to amity and the persons whose property was destroyed as to citizenship, both or neither, must be determined as of the time the destruction took place. The rights and liabilities of the parties were to be fixed as of that date, and could not be changed by their future acts.

Indians not in amity were not to be made liable by subsequently becoming so, and aliens were not to acquire new rights for past depredations by subsequently becoming citizens. If aliens who suffered for depredations could maintain actions by becoming naturalized before the passage of the act of 1891, there seems to be no reason why they may not delay till near the time of filing their petitions.

7 If there be ambiguity on this point, the course of legislation and the practice of the Interior Department throws much light on the subject.

Before 1885 every Indian depredation act provided for indemnity for property destroyed by Indians to any "citizen or inhabitant" of the United States. (Act of 1796, May 19, ch. 30, sec. 14, 1 Stat. L., 472; act of 1799, March 3, ch. 46, sec. 14, 1 Stat. L., 747; act of 1802, March 30, ch. 13, sec. 14, 2 Stat. L., 143; act of 1834, June 30, ch. 161, sec. 17, 4 Stat. L., 731; Rev. Stat., sec. 2156.)

The act of 1885, March 3, chapter 341, referred to in the act of 1891, March 3, chapter 538 (set out in 1 Supp. to Rev. Stat., 2d ed., p. 913, note), provided for the continuation of the examination, allowance, and approval of Indian depredation claims on behalf of "citizens of the United States," omitting the words "or inhabitants," used in former acts.

This was regarded by the Interior Department as significant of the intention of Congress to limit allowances in such cases to citizens of the United States at the time the depredations were committed; and it has ever since been the practice of the department to find, in allowed cases, that the claimants were citizens of the United States at the time of the commission of the depredations.

The jurisdictional act of 1891, March 3, chapter 538, which we are now considering, adopted the language of the act of 1885 to which it refers, and in our opinion Congress intended to use therein the words "citizens of the United States" in the sense that had been given by the Interior Department to the same words in the

act of 1885 for the past six years, which, it must be presumed, was known to Congress.

In this we do but adopt and follow the ruling of the Interior Department under said act of 1885, the general policy of which, except as to jurisdiction, Congress seems to have intended to continue.

The claimant contends that if that interpretation be correct, having duly made the primary declaration to become a citizen (R. S., § 2165) before the depredations were committed, he was in law a citizen for the purposes of the act.

On this point the authorities are against him, and we cannot adopt that construction. Richards *v.* McDaniel (2 Nott & McCord, 351, and 1 McCord, 187); *In re* Desty (8 Abb. New Cases (N. Y.), 250); *In re* An Alien (7 Hill, 141); Dryden *v.* Swinburne (20 W. Va., 89); Long *v.* Randall (4 Dill., 425).

The constitution and statutes determine, without ambiguity, who are citizens (Constitution, art. XIV, sec. 1; Rev. Stat., §§ 2165 to 2174) and departmental practice to the contrary has no force. It is only where there is ambiguity in statutes that such practice can be invoked in construing their meaning, as in this case, as to what time the claiman- was to have been a citizen.

The judgment of the court is that the petition be dismissed for want of jurisdiction.

8 IV.—*Judgment Dismissing Petition.*

BENJAMIN H. JOHNSON
v.
THE UNITED STATES and THE UTE INDIANS. } 2672. Indian Depredation.

At a Court of Claims held in the city of Washington on the 4th day of December, 1893, judgment was ordered to be entered—

That the court do order, adjudge, and decree that the petition of the claimant, Benjamin H. Johnson, be dismissed for want of jurisdiction.

BY THE COURT.

9 V.—*Application of Claimant for and Allowance of Appeal.*

BENJAMIN H. JOHNSON
vs.
THE UNITED STATES & UTE INDIANS. } Indian Depredation. No. 2672.

WASHINGTON, D. C., *January* 13, 1894.

The claimant, Benjamin H. Johnson, by his attorney, John Wharton Clark, gives notice of and makes application for an appeal from the decision of the Court of Claims rendered in the above-entitled cause in favor of defendants and against the claimant upon the 4th day of December, 1893.

JOHN WHARTON CLARK,
Attorney for Claimant.

Filed and allowed in open court January 15, 1894.
WILLIAM A. RICHARDSON,
Chief Justice.

10 In the Court of Claims.

BENJAMIN H. JOHNSON *vs.* THE UNITED STATES and THE UTE TRIBE OR NATION OF INDIANS.	No. 2672. Indian Depredation.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of the claimant for and the allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims, at Washington city, this 7th day of February, A. D. 1894.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Case No. 15,503. Court of Claims. Term No., 1119. Benjamin H. Johnson, appellant, *vs.* The United States and The Ute Tribe or Nation of Indians. Filed February 8th, 1894.

Supreme Court U. S.
FILED.
SEP 20 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1895.

BENJAMIN H. JOHNSON,
Appellant,
vs.
THE UNITED STATES AND THE UTE TRIBE OR NATION OF INDIANS,
Appellees.
No. 325.

BRIEF AND ARGUMENT FOR CLAIMANT.

JOHN WHARTON CLARK,
Attorney for Claimant.

In the Supreme Court of the United States.

October Term, 1895.

BENJAMIN H. JOHNSON, *Appellant,* *vs.* THE UNITED STATES AND THE UTE TRIBE OR NATION OF INDIANS, *Appellees.*	No. 325.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AND ARGUMENT FOR CLAIMANT.

Statement of Facts.

The facts in this case are set forth in the amended petition (Rec. p., 1), and in the opinion of the court below (Rec., pp. 3 and 4), and are, so far as necessary for the determination of the question at bar is concerned, briefly, as follows:

Benjamin H. Johnson, the claimant in this case, emigrated from England to the United States with his father, in 1848, when he was only thirteen years of age, and has resided in the United States ever since. He declared his intention to become a citizen of the United States before the 10th day of June, 1866, the date of the loss complained of (Rec. p., 4), and took out his final citizenship papers in 1873. Claimant

was, therefore, not a citizen of the United States, in the technical sense of that word (R. S., Sec. 2165), at the date of this loss, but was a citizen of the United States when the law of March 3, 1891, giving the Court of Claims jurisdiction in this claim, was enacted (26 Stats. L., p. 851), and had been for eighteen years prior thereto.

It is also admitted (Rec., p. 2) that in allowing claims for Indian depredations under the Act of March 3, 1885 (23 Stats. L., p. 376) it has been the practice of the Interior Department to interpret the words, "citizens of the United States," therein used, as meaning only those who were citizens or had declared their intention to become citizens of the United States at the time the depredations were committed; and such citizenship was found when neither alleged or thereto testified where the contrary did not appear.

The defendants made a motion to dismiss this claimant's petition for the reason that it showed that the claimant was not a citizen of the United States at the time the depredation was alleged to have been committed, and that, therefore, the Court was without jurisdiction in the case, under the law of March 3, 1891 (26 Stats. L., chap. 538, p. 851), and thereupon the Court below dismissed claimant's petition (Rec., p. 6). And then appeal was taken from the decision of the court below to this Court (Rec., p. 6).

The Interpretation and Construction of the Indian Depredation Law, March 3, 1891, in Respect of the Words, "Citizens of the United States."

This case brings before this Court the interpretation and construction of the words, "citizens of the United States," as found in the Indian Depredation Law of March 3, 1891 (26 Stats. L., chap. 538, p. 851). Those words appear but

once in this law, and that, in the first jurisdictional paragraph, which is, as follows :

" That in addition to the jurisdiction, which now is or may hereafter be, conferred upon the Court of Claims, said Court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely :

First, All claims for property *of citizens of the United States* taken or destroyed by Indians belonging to any band, tribe or nation, in amity with United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

In this discussion, we shall maintain the following proposition on behalf of claimant:

First, That the Indian Depredation Law of March 3, 1891 (26 Stats. L., p. 851), so far as respects the question of citizenship of claimants, should have a prospective and not a retrospective effect, as given by the court below.

Second. This claimant is entitled to recover under the second jurisdictional paragraph, or treaty paragraph, of the law of March 3, 1891 (26 Stats. L., p. 851, par. 2), although not a citizen of the United States, because of the fourth section of the treaty with the Tabequache Ute Indians, which provides for indemnity to " white residents " as well as citizens of the United States. (Treaty of October 7, 1863, 13 Stats. L., p. 673.)

Third. That the laws governing citizenship have a retrospective effect in favor of the citizen, covering all defects which exist on account of his prior alienage, and placing him in the same position as though a natural born citizen of the United States.

Fourth. That this claimant should recover in this case, because he had declared his intention to become a citizen of the United States prior to his loss on June 10, 1866, and

was, therefore, a citizen of the United States under the intendment of the law of March 3, 1891 (26 Stats. L., p. 851) giving the Court of Claims jurisdiction of Indian depredation cases.

Under our first proposition the attention of the Court is called to the following discussion and authority cited.

The question raised in this case is purely jurisdictional and has nothing to do with the liability of defendants under this law.

It is a general rule of statutory construction that a law should effect cases *in futuro* only. This logically follows from the very definition of the word, law, as being a rule of action (1 Black Com., p. 46). "It is the very essence of a new law that it should apply to future cases, and such must be its construction unless the contrary clearly appears" (McEwen *et al. vs.* Den Lessees, 24 How., pp. 242–244). And it was very early decided by this Court in the case of Mathews *vs.* Zaine *et al.* (7 Wheaton, p. 164), that an act of Congress takes effect from the time of its passage.

If this Court must depart from the ordinary rules of construction in deciding this case and determine that this law, under consideration, retroacts to the time of the loss as respects the requirement of citizenship, it can do so only after it has concluded that the law itself plainly and unequivocally shows such to have been the intention of Congress or that such intention is necessarily implied. (United States *vs.* Heth, 3 Cranch, pp. 398–413; Harvey *vs.* Tyler, 2 Wal., pp. 328–347; Sohn *vs.* Waterson, 17 Wal., pp. 596–600; Twenty per cent. cases, 20 Wal., pp. 186–187; Chew Heong *vs.* United States, 112 U. S., p. 559; Murray *vs.* Gibson, 15 How., pp. 421–423.)

But this law discloses no plain intent on the part of Congress, nor any necessary implication, that it should be given a retroactive effect in regard to the requirement of citizenship of claimants. There is nothing in the wording of this

law that can be construed into even a doubtful intent on the part of Congress to give it such an effect. This claim was the claim of a citizen of the United States, on March 3, 1891. This claimant had been a citizen of the United States, when this law passed, for about eighteen years. The property, taken by the Indians, which is the measure of damages in these cases, did not exist when the Court of Claims were given jurisdiction of them, so far as this claimant was concerned. All that remained to him was his claim or right to indemnity for what had been destroyed or taken. The property right that he originally had, had become merged in his claim. His right under this law is one in the nature of damages; this law does not deal with property, but the right which is in the claimant on account of his prior ownership of the property taken by the defendant from him. No right of property ever vested in the defendant Indians by their felonious act. Had this property a present existence or had it existed in 1873, after this claimant became a technical citizen of the United States, it belongs to this claimant as such citizen, and he would have the right to the possession of it wherever he could find it. There is no force in the argument, therefore, made by the counsel for the Government to the court below, that this property was the property of an alien at the time it was lost and that, therefore, that court was without jurisdiction. If the property existed after the claimant became a citizen of the United States, in 1873, it belonged to him as the rightful owner, and if it did not exist he had the right to indemnity under the then existing laws and treaties; and his becoming a citizen of the United States certainly did not impair that right.

The reason why Congress inserted the word, "property," in the first section of this law is, manifestly, because there were a large number of claims filed in the Indian Office for damages on account of personal injury, and Congress intended

to exclude all such claims under this section; and it is urged with all earnestness that this section forms no basis from which this Court can infer that Congress intended to make a distinction between the property of a citizen of the United States and the property rights of such citizen, who became such before the passage of this law, even though not such at the date of the loss.

The words, "all claims for property of citizens of the United States," are in the most natural order to distinguish claims for property from other claims, and no transposition of those words can change their meaning. The plain intent of this law was to deal with claimants as it found them; if it found them citizens of the United States they were qualified to recover, so far as that jurisdictional requirement was concerned. This law is not concerned with this claimant's status in this respect at the time the loss occurred. That must be controlled by the laws then in force, and if there is no other reason for requiring that this law have a retrospective construction, in regard to citizenship, than is found in the mere wording of this paragraph, then it must be construed as prospective only. To construe this law to mean "all claims of citizens of the United States" *at the date of the loss*, would be to read into the statute a meaning which, to say the least, is not plainly and clearly the expressed or implied intent of Congress. The words in this statute, referring to citizens of the United States, are plain and need no interpretation, and it is contrary to the well-settled rules of statutory construction to read a meaning into a statute. (Vattal Maxims of Interpretations, B. 2, c. 17, par. 263; Newell *vs.* The People, 7 N. Y., 97; McCluskey *vs.* Cromwell, 11 N. Y., 601.) 612 U.S. 536-567

The court below in its opinion (Rec., p. 5) argues that "it is evident that this paragraph under discussion relates to but one point of time and that period was when the depre-

dation was committed," for "it never has been questioned, and nobody can doubt, that it was the amity of the band, tribe or nation at that time which must be proved"; and, also, because "the words, citizens of the United States and Indians belonging to any band, tribe, or nation in amity with the United States, are so closely connected in the same paragraph, that they must refer to the same point of time"; and, therefore, "the status both of the Indians as to amity, and the persons whose property was destroyed as to citizenship, both or neither, must be determined as of the time the destruction took place."

These two reasons, on which mainly the court below bases its conclusion, are distinct, and will be considered separately.

It is true, it was never questioned that the tribe of Indians must be *in amity* at the date of the loss, in order that claimant may recover, and there can be no doubt but that is the right conclusion. Neither myself nor any other attorney who argued the question of amity before the Court of Claims ever doubted or suggested but that it was the amity of the Indians at the time the depredation was committed that must govern; but the reasons which led us to that conclusion do not obtain in respect of this question of citizenship.

Every general law relating to indemnity for losses by Indian depredations, from the foundation of the Government to the present time, contains the requirement that the Indians must be in amity with the United States in order that the claimants might recover. (Act of 1796, 1 Stats. L., 472; Act of 1799, 1 Stats. L., 747; Act of 1802, 2 Stats. L., 143; Act of June 30, 1834, C. 161, Sec. 17, 4 Stats. L., 731; R. S., Sec. 2156.)

And it is a well-settled rule of statutory construction that where vital words are enacted into a subsequent law from a prior law on the same subject, it is not so far a new law, but a reaffirming of the old. All the old laws, therefore, having

contained the phrase, *in amity*, and never having been repealed in this respect, that condition has its effect by reason of prior laws and not on account of the Act of March 3, 1891. Indeed, if this amity phrase had been left out of this law under consideration, and no clause repugnant to it had been inserted, it must still have been construed as having effect from the old laws *in pari materia*. The condition of amity of the Indian tribe always was the law, and it would be absurd to question that it should not exist at the time of the loss. (Sutherland Statutory Construction, Sec. 133; Murray *vs.* Gibson, 15 How., 121–124; 24 How., 242.)

But no such condition obtains in respect of the citizenship of claimants. All the old laws, to which reference have been made in the foregoing section of this brief, provide for indemnity to inhabitants as well as citizens of the United States. And Section 2156 of Revised Statutes, which is the embodiment of the old laws giving indemnity for losses by Indian depredation, provides for indemity to *inhabitants* of the United States as well as citizens, and this section was in full force and effect when this law of March 3, 1891, now under consideration, was enacted; and was manifestly intended by Congress to be covered by the first paragraph of this law giving the Court of Claims jurisdiction.

By the laws existing therefore at the time this law went into effect, this claimant would have been entitled to recover as an *inhabitant* of the United States; this law having for the first time taken away his right as such inhabitant. Under the laws in force when this loss occurred, on June 10, 1866, and those in force down to March 3, 1891, this claimant had the same and equal rights of recovery as an inhabitant of the United States as were possessed by any citizen of the United States. It is contrary to law and justice that this law should be construed so as to require this claimant to be a citizen of the United States when his loss occurred,

since the laws then in force gave him relief as an inhabitant of the United States. Such a retrospective construction is unjust, and this Court will avoid it unless the intent of Congress is plainly and unmistakably expressed or necessarily implied. The condition of amity attached to these claims by reason of the laws in force at the time of this loss, and therefore the proof of amity at the time of the loss, is a proper requirement, but it would certainly be unjust to make the proof of citizenship at the date of the loss a condition of recovery on the part of the claimant, since the laws then in force did not require that condition.

The court's second reason that amity of the Indians and the citizenship of the claimant must both refer to the same point of time, because they are so closely connected in the same paragraph, is met by claimant's argument in answer to the court's first reason, but it is farther urged that the mere juxtaposition of words is a very unsafe criterion for their interpretation and construction. If closely related words refer to the same object or to the same party, or if to different parties in the same relation or equally favored, then the mere position might serve as a guide, when there was grave doubt as to what the construction should be. But in this paragraph the word, *amity*, refers to the defendant Indians, the party against whom this remedial statute gives relief, and *citizenship* refers to the claimant, in whose favor this remedial statute was made. Now, it is a primary rule of statutory construction that remedial statutes should be interpreted most liberally in favor of the party in whose favor the remedy is given, therefore the same liberal rule of construction cannot be applied to the defendant Indians that must be applied to claimants. (Sutherland Statutory Construction, par. 410.) And Lord Kenyon (in 6 T. R., 426–429) said: "In expounding remedial laws, it is a settled rule of con-

struction to extend the remedy as far as the words will admit." It is not urged here that the Court should depart from the words used where the language is explicit in aid of this remedial statute, but it is urged with all earnestness that the Court should not read into this statute a meaning for the purpose of defeating the remedy.

And this rule of construction, contended for in the foregoing paragraph, is not changed because the United States has made itself a voluntary party to this suit, for when they so elect they come into court having no higher rights or privileges than other litigant. They stand on the same footing that any other defendant would—no more privileged, nor no less. (United States *vs.* Arredondo *et al.*, 6 Peters, 711.) This suit must be determined as though the controversy were between "man and man," notwithstanding the United States is a party. (United States *vs.* Klein, 13 Wal., 144.)

The foregoing argument being true, the conclusion of the court below—"that the status of the Indians as to amity, and the persons whose property was destroyed as to citizenship, both or neither, must be determined as of the time the destruction took place"—is false. The fallacy in the reasoning of the court below is apparent from the language used in its opinion. The court says that "the rights and liabilities of the parties were to be fixed as of that date" (the date of the loss), "and could not be changed by their future acts. Indians not in amity were not to be made liable by subsequently becoming so, and aliens were not to acquire new rights for past depredations by subsequently becoming citizens."

As shown already in this argument, the amity of the Indian tribe whose members committed the depredation, was always necessary in order to recover, under all the Indian depredation laws from which the first section of the law of

March 3, 1891, derives its force in respect of amity. The condition of the amity of the Indians was made necessary by the laws in force at the date of the loss by the claimant; not by reason of this law now under consideration. So, too, the condition under which the claimant might recover as respects citizenship or inhabitancy was fixed by the laws in force at the date of the loss and not by this law now under consideration at any point anterior to its passage. But the laws then in force did not require that the claimant be a citizen of the United States in order that he might recover; that condition was fixed by the law now under consideration. The laws in force at the time of this claimant's loss gave him the right of indemnity by reason of his being an *inhabitant* of the United States. His rights were fixed by the laws in force at that time, as were also the liabilities of the defendant Indians. The court below was right when it said that the rights and liabilities of parties were fixed at the time of the loss, but the logical conclusion from its premises when applied to this case is diametrically opposite to its conclusion reached in this opinion.

True this claimant never brought his suit under the old laws, but instituted it first under this law; but that should not deprive him of the rights which accrued to him at the time this depredation was committed, by making this new condition of citizenship retroact at the time of the loss. This condition should not be imposed upon this claimant at any point of time anterior to the passage of this law. To so construe this law as to do this would be unjust, and must be avoided if possible.

The proper construction of the application of citizenship, in the first jurisdictional paragraph, which alone we have been considering up to this point, seems so plain that the aid of departmental construction would not be considered by this Court. Departmental construction is not conclusive,

and in no way binds this Court. (Endlich Interpretation of Statutes, Secs. 360–361.) Departmental construction might be invoked to resolve a doubt, where the meaning of the statute was not plain, and where it did not controvert a legal principle; but never where such construction is contrary to a well-settled principle of law. Nor will this Court follow such a departmental construction, nor infer an intention of Congress from such a construction.

But as the court below lays much stress upon the departmental construction given to the Act of March 3, 1885 (23 Stats. L., 376), we will examine that position more particularly. This act of 1885, referred to in this section, provided for the investigation, examination and approval, by the Secretary of the Interior, of Indian depredation claims, "on behalf of citizens of the United States." This law authorized the investigation of Treaty claims only, and not those claims based upon the amicable relation of the Indians under the old laws, referred to in the preceding pages. (See Brief of Counsel for Claimant, in the case of William Cox *vs.* U. S. *et al.*, pp. 351–352–353–354, 29 Ct. Cls.) These Treaty claims form the subject-matter of the second jurisdictional clause of this law of March 3, 1891, now under consideration by this Court (26 Stats. L., 851, par. 2). The Acts of 1885 (23 Stats. L., 376) and the similar acts of 1886 (24 Stats. L., 44, and 24 Stats. L., 464) are specifically mentioned in the second jurisdictional clause of this law giving the Court of Claims jurisdiction of Indian depredation claims, and this claimant's rights under this Treaty paragraph will be discussed hereafter. It is urged that the first and second jurisdictional paragraph of this law, now under consideration, are separate and distinct from each other; the first covering the amity claims of the old laws, culminating in section 2156 R. S., and the other covering the Treaty obligations of the Indians, and embodied in the acts of Congress (23 Stats. L., p. 376, and 24 Stats. L., pp. 44 and 464).

In a large number of cases allowed by the Secretary of the Interior, under the Act of March 3, 1885, neither the allegations nor the proof state, specifically, that the claimant was a citizen of the United States at the time of the loss, but state that he was a citizen of the United States without respect to the time. So far as the allegations and proof are concerned, the claimants in many cases may have been citizens of the United States at the date of filing the case, only, and not at the date of the loss at all (Rec., p. 1). This Court will not presume, therefore, that Congress intended it to follow the findings of the Secretary of the Interior, based upon such uncertainty of allegation and proof. But, in any event, the court below should, by following the departmental construction, have decided that this claimant was a citizen of the United States for the purposes of this act, for he is admitted to have declared his intention to become a citizen of the United States prior to the loss (Rec., p. 1), and that satisfied the condition of citizenship under departmental construction (Rec., p. 1).

But, even though there had been uniform allegation, proof and findings that claimants were citizens of the United States at the date of the loss, under the Act of March 3, 1885, by the Secretary of the Interior, even then this Court is in no way bound to follow a vicious departmental construction; nor can it be inferred that Congress intended it to follow such a construction. This Act of March 3, 1885, which was essentially an appropriation act, directed the Secretary of the Interior to list, examine and approve, or disapprove, all claims for Indian depredation "on behalf of citizens of the United States chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States." It does not say on behalf of any person who was a citizen of the United States at the time the depredation was committed, and therefore that act could have

effect in the future only. The foregoing argument in respect of the proper construction of the law of 1891, now under consideration, and the cases heretofore cited and those which will be hereafter cited, are applicable here, for it is the same contention exactly. Every claimant who was a citizen of the United States on March 3, 1885, who had suffered loss by Indians of a tribe having a treaty with the United States, had a legal right to have his claim listed and examined under that law, even though he were an alien at the time the depredation was committed. This claimant's rights could not have been effected by proper construction of the law of March 3, 1885, for he had been a technical citizen of the United States for eleven years when that act passed.

It is not maintained on behalf of claimant that the construction given by the court below in this claim, as considered under the first jurisdictional paragraph, the *amity paragraph*, is contrary to the Constitution of the United States. Under the first or amity paragraph, perhaps, this claimant has not been divested of any vested right, by the construction given in this case by the court below. It is not argued that this claimant has a vested right to a particular action, because of prior existing laws alone, when he had not availed himself of those laws by filing his claim under them, but we do contend with all earnestness that a natural and liberal construction should be given to this remedial statute in favor of claimant, in whose interests this statute was made. That such a liberal construction demands that the condition of citizenship be construed to attach to this claimant at no point of time anterior to the time when the law of March 3, 1891, went into effect.

That this remedial statute should not have a retrospective construction as given it by the court below, and that, too, against the very person in whose favor this statute was

made. That such a construction is unjust and contrary to the well-settled laws of England and the United States. Courts of justice have universally disfavored retrospective construction and permit statutes to have such an effect only when they express the intent of the legislature in that respect plainly and clearly. It is not enough that retrospective construction may be given. This Court must be bound by something more than permission, or it must give this statute a prospective construction only. The language of this Court and the Courts of England and the different States of the Union is very strong, and their decisions harmonious on the construction of statues in this particular.

Abstracts of Authorities Covering This Point

In a very early decision of this Court, in the case of Calder *vs.* Bull (3 Dalas, p. 386), Mr. Justice Patterson, giving the opinion of the Court, after defining *expost facto* laws, and giving the reasons urged by the framers of the Constitution for not placing retrospective laws in the same category, says :

" I had an ardent desire to have extended the provisions in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws ; therefore, I have always had a strong aversion against them. It may in general be observed of retrospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact."

The same Justice, giving the opinion of the Court in United States *vs.* Heth (3 Cranch, pp. 398–413), laid down the following rule in respect to the construction of statutes, and this rule has been followed by this Court down to the present time. The Court said :

" Words in a statute ought not to have a retrospective

operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied."

In Murray *vs.* Gibson (15 How., pp. 421–423) this Court said:

"As a general rule for interpretation of statutes it may be laid down, that they never should be allowed a retrospective operation when this is not required by expressed command or by necessary and unavoidable implication, without such command or implication they operate upon the future only. Especially should this rule of interpretation prevail when the effect and operation of the law are designed, apart from the intrinsic merits of the rights of the party, to restrict the assumption of those rights."

This Court said, in the case of McEwen *et al. vs.* Den Lessees (24 How., pp. 242–244):

"It is insisted that the act is retrospective as well as prospective. * * * We think the statute of 1856 is prospective and that to hold otherwise would be a strained construction and violate a general rule of jurisprudence, to-wit, that it is the very essence of a new law that it should apply to future cases, and such must be its construction unless the contrary appears."

Mr. Justice Miller, giving the opinion of the Court in the case of Harvey *vs.* Tyler (2 Wal., pp. 328–347) said:

"It is a rule of construction that all statutes are to be construed prospectively unless the language is expressed to the contrary, or there is a necessary implication to that effect."

Also Sohn *vs.* Waterson (17 Wal., p. 596).

In the 20 Per Cent. Cases (20 Wal., p. 187) Mr. Justice Clifford, giving the opinion of the Court, said:

"Courts of justice agree that no statute, however positive in its terms, is to be considered to interfere with existing con-

tracts, rights of action, or with vested rights, unless the intent that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule, courts will apply new statutes only to future cases unless there is something in the nature or in the language of the new provision which shows that they were intended to have a retrospective operation. Even though the words of a statute are broad enough to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise unless the language employed expresses to the contrary intention in unequivocal terms."

It was also stated by this Court in Chew Heong *vs.* The United States (112 U. S., p. 559), as follows:

"The courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously effected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

In the case of Abington *vs.* Duxbery (105 Mass., p. 287), the town of Duxbury brought an action against Abington for the support of certain paupers who had moved from the latter to the former town. This case brought up for construction the law passed by the Massachusetts Legislature in 1870, which declared settlements acquired by the law in force, February 11, 1794, to be lost. This suit was brought in 1866, prior to the passage of the act of 1870; and the Court below held the act of 1870 to be retrospective. The Supreme Court reversing the court below, said:

"The rights of the parties were fixed before the passage of the Act of 1870, and we cannot suppose that the Legislature intended to change that, nor do we think that a fair construction of the statutes makes it thus retrospective. Certainly such intention is not manifest by such clear and unequivocal expression as would authorize us to construe it as retrospective."

The case of Taylor *vs.* Michell (57 Pa., p. 309) was an action to contest a will. The testatrix made a will in 1843, disposing of a part of her property to charitable institutions, and in 1855 the Legislature of Pennsylvania passed a law providing that no property could be bequeathed to a religious or charitable institution in trust unless the will was attested by two credible, disinterested witnesses. The testatrix died in 1866, leaving a will which had not thus been attested. It was argued that the act of 1855 should be construed as retrospective, but Judge Sharswood, giving the opinion of the court, said:

"Such a construction might justly be applied to a law which on its face appeared to be retrospective, in order to retain it to a prospective operation, but it would certainly be a novelty to apply it conversely. There is no course of construction better settled than this, that a statute shall always be interpreted so as to operate prospectively and not retrospectively unless the language is so clear as to preclude all question as to the intention of the Legislature.

Retrospective laws generally, if not universally, work injustice and ought to be so construed only when the mandate of the Legislature is imperative. When a testator makes a will formerly executed, it would unjustly disappoint his lawful rights of disposition to apply to it a rule subsequently enacted, though before his death."

Dash *vs.* Vankleek (7 John., N. Y. Rep.) is a leading case on this subject, and Chief Justice Kent, giving the opinion of the court, at page 506, made the following observation:

"There has not been, perhaps a distinguished jurist or elementary writer, within the last two centuries who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust, or disapprobation."

In Bartriff *vs.* Reaney (15 La., p. 257), which was an action for a penalty an account of arrears of taxes brought

under the act of Iowa Legislature of March 1, 1861, for arrears which had accrued before the statute had passed, the court said:

"The general tendency of the judicial mind has been, and that, too, with great steadiness of purpose, both in England and this country, to hold that unless the retrospective intent of the Legislature is clearly expressed upon the face of the enactment, it shall be deemed to commence *in futuro*."

Hammon, Adm. *vs.* Bank of Tenn. (1 Coldwell, Tenn., p. 398) was a case which called for the interpretation and construction of the act of the Tennessee Legislature, which provided that no bank shall pay interest or other compensation in consideration of deposits, the court said:

"Remedial statutes may be of retrospective nature provided they do not impair contracts or disturb absolute vested rights and only go to confirm rights already existing and in *furtherance of the remedy* by curing defects and adding to the means of inforcing existing obligations. The very essence of a new law is a rule for future cases, and therefore, even in cases involving no question as to the inviolability of past agreements, or previously acquired rights, the authorities concur that a statute never ought to receive a construction as would make it operate retrospectively, if it be *susceptible of any other*. In such cases, it is said, we are to presume out of respect for the law that it is not intended that the statutes should have a retrospective operation."

The statute of frauds was construed in the case of Gilmore *vs.* Shutter's Exs. (2 Mod., p. 310). That statute provided that from and after the 24th day of June, 1877, no action shall be brought to charge any person upon any agreement made in consideration of marriage, unless such agreement be in writing. Shutter promised the plaintiff by parole before the 24th day of June, 1877, to give him £2,000 if he married the daughter of one Harris, or leave him that

amount in his will. The marriage took effect, and Shutter died without making any provision in his wlll for the marriage agreement, and consequently this suit was brought against his executors. The Court gave judgment for the plaintiff. In the opinion the Court said:

"For it cannot be presumed that the act had a retrospect to take away an action to which the plaintiff was then entitled, for if a will had been made before the 24th day of June, yet the will had been good though it had not been in pursuance of the statutes."

Not to weary the patience of the Court by further extracts, we cite the following cases, to which many more might be added, containing the same general line of decision: Richardson's Adms. *vs* Cook *et al.* (37 Vt., p. 604); Re Mills Will (27 Beav., p. 579); Hastings *vs.* Lane (15 Me., p. 135); Brown *vs.* Wilcox (14 S. M., Miss.); Quacken *vs.* Bank (1 Denio, p. 128); Midway R. Co. *vs.* Gage (10 C. B., N. S., p. 191); Owen's Successors (41 Am. Dec., p. 274).

The above-cited cases, which are only a few of the very many decisions of the highest courts of this country and England upon the subject of retrospective laws, are sufficient to show the state of the judicial mind in respect to them. They show that the intention of the Legislature must be plainly expressed in the statute itself, by words that are plain and unequivocal, before the courts can give a retrospective construction to a law; they show that mere general words cannot be construed by the court as giving to a statute a retrospective effect, and that if general words only are used then it is the duty of the court to give them a prospective construction only. They show that if a remedial statute is construed by the courts as being retrospective, that it must be in furtherance of the remedy and not in restriction thereof. The words, "all claims for property of citizens of

the United States," which you are called upon to construe in the case at bar, are manifestly general words. The statute under which this claimant sues is a remedial one, and the remedy given by it is in favor of this claimant and against the defendant, and it makes no difference in this respect that the United States is a party defendant in this suit.

True, the courts have given retrospective construction to statutes, where the intention of the Legislature was plain or necessarily implied, but it has been universally and without exception, so far as counsel can find, in furtherance of the remedy sought to be given, and only in furtherance of the remedy. Such construction has been given in furtherance of a well-settled public policy, as in the case of Cook *vs.* McChristian (Cal., p. 23); or for regulating and systematizing the proceedings of courts, as in the case of Smith Bros. *vs.* Vangielder (26 Ark., p. 533); statutes requiring that marriage settlements and agreements must be recorded; or statutes providing for the registration of deeds and the like. And it will be found that wherever courts have departed from the general rule of statutory construction, contended for herein, and made, as it were, an exception to the rule, that the courts' decisions were based upon principles of public policy and convenience.

We contend, in the second place, that this claimant has a vested right under the Treaty of October 7, 1863 (13 Stats. L., p. 673), and that the second jurisdictional or treaty paragraph of this law under consideration gives the Court of Claims jurisdiction of this claim, and this Court cannot so construe this law as to take away or impair that right. The second jurisdictional paragraph is, as follows:

"Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the Act of Congress making appropriations for

the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided."

The Act of March 3, 1885 (23 Stats. L., p. 376), referred to before in this argument and also set out in part in the opinion of the court below (Rec., p. 5), appropriated ten thousand dollars for the listing and investigation of Indian depredation claims, "chargeable against any Indian tribe by reason of any treaty beween such tribe and the United States and on behalf of citizens of the United States."

The Department of the Interior construed this Act of 1885 to apply to only such claims as had been filed within three years after the time of the loss, under the limitations of the 17th Section of the Act of June 30, 1834 (4 Stats. L., p. 731). Hence, the Act of May 15, 1886 (24 Stats. L., p. 44) and subsequent acts, which were acts continuing the investigation and examination of Indian depredation claims, provided that "the examination and report shall include claims, if any, *barred by statute*," and all subsequent acts referred to in the second jurisdictional clause of the law of March 3, 1891, contained the same provision. And the second section of the law of March 3, 1891 (26 Stats. L., 851, Sec. 2) is, as follows:

"That all questions of limitation as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government."

Therefore, the case at bar is one which was "authorized to be examined" under the second or treaty paragraph of

the Act of March 3, 1891, now under consideration. For the Ute Tribe of Indians, to which these Indians which committed this depredation belong (Rep. of Com. of Ind. Affairs for 1866, p. 61), were chargeable for this depredation under the treaty of March 25, 1864 (13 Stats. L., p. 674). Section 6 of that treaty is, as follows:

"And it is agreed that the chiefs of said Tabequache band shall, to the utmost of their power, exert themselves to recover horses or other property which may be taken from any citizen or citizens or *white residents* of the United States by any individual or individuals of said band, and the property so recovered shall be forthwith delivered to the agent or other persons authorized to recover it, that it may be returned to the proper owner. And for such property as any Indian or Indians belonging to said band may have taken from any citizen or *white resident* of the United States, which cannot be restored, payment shall be reserved from the annuities which the said band is to receive, upon sufficient proof of the fact."

This treaty is a solemn contract to pay this claimant as a "white resident" for the depredation committed by the defendant Indians, which cannot be impaired by subsequent legislation. It needs no act of the legislature to make this treaty operative. For it points out the very fund from which this claim is to be paid. "Payment shall be reserved from the annuities which said band is to receive," is the language of the treaty. This Court said, in the very early case of Foster *et al. vs.* Neilson (2 Peters, p. 253): "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislative whenever it operates of itself without the aid of any legislature provision." (United States *vs.* Percheman, 7 Pet., at p. 89, and 12 Pet., p. 511.) In the case cited from 7 Peters, the Court held the words, "shall remain ratified and confirmed to the persons in pos-

session," to be operative in the treaty without first being executed by a legislative act.

As this treaty is self-operative, needing no act of Congress to execute it, as the very fund from which this claimant is to be paid is pointed out, it is even more than a contract. "It is a rule of action which must be made effectual when the property has been proved to have been taken." (Hoover *vs.* Yaker, 9 Wal., p. 32.) And, if a rule of action, then binding on this Court. Furthermore, there can be no distinction made between a treaty with an Indian tribe and with a foreign nation so far as its effect as a contractual obligation is concerned. (Tyrner *vs.* The American Baptist Missionary Union, 5 McLean, p. 347; Wilson *vs.* Wall., 34 Ala., p. 288; Houenstein *vs.* Lynham, 28 Gratt., p. 62.)

The condition of citizenship as a requisite of recovery, under the second or treaty paragraph, was not imposed by the law of March 3, 1891. It would have been unreasonable to have given the court jurisdiction of treaty claims and then to have imposed a condition and limitation which the treaty did not contain. In the words of Judge Nott, in in his elaborate and well-reasoned opinion in the Love Case (29 Ct. Cls., pp. 332–337)—

"When the grant of jurisdiction passed to the court there were claims resting on treaties and statutes in which there were terms broad enough to include 'inhabitants.' In such cases it would be no defence for the Indian defendants to say that inhabitants whom they had despoiled were not citizens; and, conversely, if the United States secured stipulations in favor of inhabitants, on the faith of which aliens went into the dangerous vicinage of the Indians, it was but right to allow them the jurisdictional privilege of prosecuting their claims."

We are not unmindful that there is a line of decisions comparatively uniform, that hold that it is competent for the

legislature to pass laws changing the remedy, if such change does not materially effect rights which are vested. But the legislature cannot take away all remedy. It must give a remedy in some form (Williams, Adm. *vs.* Johnson, Admx., 30 Md.; Sturger *vs.* Crowning, 4 Wal., at p. 200; Green *vs.* Biddle, 8 Wheat., at p. 75; Brunson *vs.* Kensie *et al.*, 1 How., p. 311). And in any event these decisions do not effect the jurisdictional question raised in this case, nor would they effect this case if it were considered on its merits.

It may be argued on behalf of the defendants that this claimant's rights have not been impaired and his remedy not effected by the passage of this law of March 3, 1891; that he still has his rights under this treaty preserved and his remedy in the Department of the Interior. It can hardly be imagined that such a position will be taken; but, if so, then it is argued that the 13th Section of the Act of March 3, 1891 (26 Stats. L., pp. 851-854), manifestly intended to transfer the jurisdiction for all Indian depredation claims to the Court of Claims, and to leave no remedy in the Interior Department for them. The intention of Congress in this 13th Section is apparent. The section reads thus:

"That the investigation and examination, under the provisions of the acts of Congress hitherto in force, of Indian depredation claims, shall cease upon the taking effect of this act;"

and all moneys appropriated for such investigation and examination, except sufficient to transfer the claims and the records of the same to the Court of Claims, shall be covered into the Treasury. There can be no doubt, therefore, that Congress intended that the Court of Claims should have power "to inquire into and finally adjudicate" every Indian depredation claim which the Department of the Interior had power, under prior laws, to "investigate and examine." (Love, Adm. *vs.* United States *et al.*, 29 Ct. Cls., pp. 332-339.)

The Naturalization Laws of Congress Have a Retroactive Effect.

But if this Court still concludes that this law of March 3, 1891 (26 Stats. L., p. 851), requires that this claimant be a citizen of the United States, as contemplated by law, at the date of the loss, and that this claimant has no vested right under the treaty with the Ute Indians, then we urge on behalf of claimant that the Naturalization Laws, under which this claimant became a citizen of the United States, retroact in his favor and cure all defects which might be otherwise fatal. It is a well-settled principle of common law that the naturalization of an alien, which could only be effected by Act of Parliament (Co. Litt., p. 129 a) placed the citizen so naturalized in the same condition as though he were a natural born citizen (*Ib.*, Note 199, p. 129 a), and cured all defects consequent upon his prior alienage, and this extended to the right of his lineal heirs, to inherit, born prior as well as subsequent to such naturalization (*Ib.*, p. 129 a). So if the issue of an Englishman was born out of the allegiance of the King, and was naturalized, he could inherit from his father who was a citizen (*Ib.*, p. 129 a; as also *Ib.*, p. 8 a).

And after stating that denization of the father by letters-patent do not retroact to make his eldest son born before he became a denizen inherit from him, Mr. Blackstone says:

"Yet if he (the father) had been naturalized by Act of Parliament, such eldest son might then have inherited, for that cancels all defects, and is allowed to have a retroactive energy which simple denization does not." (2 Black., p. 250.)

And this Court has declared that the same principle obtains in respect to naturalization, under the laws of Congress, in the case of Oatman *vs.* Baldwin (6 Wal., pp. 121–122).

The facts in this case were, as follows: In 1839 Baldwin, a citizen of New York, went to Galveston, Texas, and purchased three lots of land in that city, receiving a certificate of purchase giving him the right to a deed. The laws of the Republic of Texas, however, prohibited aliens from holding land. Therefore, Baldwin transferred the lots to one, J. S. Huana, a Texan, as his trustee.

The question was, whether the lands escheated, or, if not, whether a fatal defect arose, because Baldwin was a citizen of New York and, of course, an alien of Texas. The Court said:

"Until office found Baldwin was competent to hold land as against third persons and no one had a right to complain in a collateral proceedings if the sovereign does not enforce his prerogative. This Court said in the case of Cross *vs.* De Valle, that an alien may take by deed or devise, and hold against anyone but the Sovereign, until *office found* is a principle of law which it requires no citations of authorities to establish. Even if the defendants could have made this objection while the Republic of Texas existed, they cannot make it now because when Texas was admitted into the Union the alienage of Baldwin was determined. His present status is that of a *person naturalized*, and the naturalization has a *retrospective effect* so as to be deemed a waiver of all liability to forfeiture and a confirmation of his title."

The Court cites, with approval, the case of Jackson *vs.* Bach (Johnson Cases, p. 401).

In that case the Court said:

"It does not lie with the defendant to object to the alienage of the lessor of the plaintiff, for the interest granted to Culverhouse was not forfeited, so as to vest the title in the people of the State, until office found, and until then he was competent to hold lands against third persons. Even if the defendant could make this objection, yet the lessor of the plaintiff having been naturalized has a *retrospective effect* so as to be deemed a waiver of all liability of forfeiture and a confirmation of the title."

So, in the case at bar, neither of the defendants can be heard to complain of the retrospective effect of this claimant's naturalization curing whatever defects may have attached to him on account of his alienage at the date of this loss (conceding for argument's sake that he was an alien); for whatever defects there may have been were cured in 1873 when he became a citizen of the United States, long before this law went into effect, under which defendants must assert the forfeiture of claimant's rights.

And it would seem that the United States could not object that this Court was without jurisdiction because of the retrospective effect of claimant's naturalization, since the laws made by them covering these very cases and in force at the date of this loss expressly provided for indemnity to "white inhabitants" for losses by Indian depredations, which must necessarily include aliens as well as citizens. (Act of June 30, 1834, Ch. 161, Sec. 17, v. 4, p. 431; Id. R. S., Sec. 2156.)

And the defendant Indians' mouths are closed, because their very treaty provided for indemnity to this claimant as a "white resident."

The naturalization of this claimant, therefore, in 1873, cured all defects because of his alienage at the date of this loss in June 10, 1866, even though the Court should hold that it was necessary for claimants to be citizens of the United States, in law, at the date of this loss. For the naturalization of a person operates to make him equally as privileged as though born in the United States, except that he is not eligible to the office of Presidency. (Collingwood *vs.* Pace, Venters Rept., p. 429.)

But it may be urged against this line of argument that we are assuming that the naturalization laws of the United States must be as potent and effectual as the special and general acts of the omnipotent Parliament of Great Britain,

to warrant the conclusion that our naturalization laws place a citizen of the United States in the same condition as if born here.

That premise is assumed in the line of argument, and it seems that it must be true, for the same omnipotence vested in the people of the United States as the sovereign power, when they secured their independence from Great Britain, as was vested originally in Parliament, the representative of the English people. And when the Federal compact was made, power to make uniform naturalization laws was delegated to Congress, the National representative of the people of the United States. (Const. U. S., Sec. 8.) It must follow, therefore, that Congress has the same power, in respect to naturalization laws, as is vested in the English Parliament, and this Court seems clearly to have recognized that principle in 6 Wal., pp. 121–122, before cited.

We are aware that the courts of some of the States of the Union have either repudiated or limited the doctrine of retroaction of naturalization laws, so well settled at common law, some upon one ground and some upon another.

In the case of White *vs.* White (2 Metc., Ky., p. 185) the court decided against the right of inheritance of lands in Kentucky by a collateral heir on the ground that, in its opinion, aliens could take lands by purchase only at common law.

In the cases of Daniels *vs.* Richards (1 McCord, S. C., p. 187), Gryden *vs.* Swinburne (20 West Va., p. 89), and Priest *vs.* Cummings (16 Wend., p. 627), the courts seemed to have supposed that denization by letters-patent of the King had the same effect as our naturalization laws and hence had no effect anterior to naturalization. The court, in the latter case, seems to think that a distinction should be made between our laws of naturalization and naturaliza-

tion by act of Parliament, because of certain words used in the acts of Parliament not appearing in our naturalization laws made by Congress.

But it is submitted that the words used in the different statutes, making alien citizens of Great Britain, are not more effectual in any respect than those used in Section 2165 of the Revised Statutes. The words used in the Statute 22, Henry VIII, "the children of Thomas Powers and others shall be reputed natural born subjects;" those used in the 7 Anne, Chap. 5, "all persons born out the allegiance of her majesty, which shall qualify themselves (etc., as therein provided), shall be deemed, adjudged, and taken to be natural born subjects of Ireland to all intents, constructions, and purposes"; and the Statute of 13 George II, Chap. 5, "shall be deemed, adjudged, and taken to be his majesty's natural born subjects, to all intents, purposes and constructions, as if they had been born within this Kingdom"; and again in the 2 George III, 25, whereby certain officers and soldiers who served in America, in the following words, "to be deemed and adjudged as if they had been born within the realm," are not more effectual words and cannot have any broader significance in construction than the words, "may be admitted to become a citizen of the United States," used in Sec. 2165, R. S. The intention of these English statutes and the intention of Congress in enacting Section 2165 of the Revised Statutes, was precisely the same, viz.: to give the persons favored by those laws the highest privilege known to any subject, and no matter what the words used in the accomplishment of that object, neither Congress nor the English Parliament could do or intended to do any more than that. Neither the omnipotent Parliament nor Congress could change the natural condition of any person. Neither of these bodies could make a person born without their allegiance, born within their

allegiance. They could not change the natural condition of a person, no matter how strong the terms used, to accomplish that object, and the acts of Parliament respecting citizens of Great Britain have their force and effect from the construction placed upon them by the courts and handed down to us as the common law of this country. This Court seems clearly to have recognized that construction in 6 Wal., pp. 121-122. The common law seems to have favored in every way possible persons who have broken their allegiance with other nations and become citizens of Great Britain, and we have wisely followed her footsteps in that particular. The common law gave the citizen of adoption all the rights and privileges that would have accrued to him had he been born in Great Britain. No more nor less. (Collingwood *vs.* Pace, Venters Rep., p. 429.)

And in any event it seems manifest, that although this Court might, possibly, as some of the state courts have done, relax the common law rule where the rights of innocent purchasers had intervened, yet they would not, it is thought, depart so far from that rule as to aid a wrongdoer where the citizen asking relief is himself benefitted by following the common law rule, and no one injured thereby, as in the case at bar.

Claimant Having Declared His Intention to Become a Citizen at the Date of this Loss is Entitled to Recover.

This claimant had declared his intention to become a citizen of the United States before his loss on June 10, 1866 (Rec. p. 4), and, therefore, under the well-settled rulings of the Interior Department and the many Acts of Congress making disposition of the Public Lands, he is entitled to all the rights and privileges of a citizen of the United States,

and should be deemed such for the purposes of this act. Congress has many times, and it is thought universally, in making laws giving right to acquire title to our public land to persons having declared their intention to become citizens of the United States, recognized this state intermediate between alienage and citizenship as being a substantial and valuable one. (U. S. R. S., Secs. 2289, 2319, 2347, and 17 Stats. L., p. 605.)

The rights and privileges granted by the United States to persons having declared their intention to become citizens so much resemble those acquired by a subject of Great Britain by denization, that it would seem that Congress must have contemplated such a status as that obtaining under denization in England where any person has declared his intention to become a citizen of the United States. A denizen under the English law could acquire and hold title to lands in Great Britain by purchase or devise (1 Black, p. 374). And his issue born after his denization may inherit from him but not those born before (Co. Litt., 129 a ; 1 Black, p. 347).

Mr. Justice Blackstone, describing and defining a denizen, said :

"A denizen is a kind of middle state, between an alien and a naturalized subject, and partakes of both of them, he may take lands by purchase or devise which an alien may not ; but cannot take by inheritance, for his parent, through whom he must claim, being an alien, has no inheritable blood ; and therefore could convey none to his son, and, upon a like defect of hereditary blood, the issue of a denizen born before denization, cannot inherit to him ; but his issue born after may."

Denization is described as a middle state between alienage and citizenship. The substantial benefits derived from denization were the rights to hold land by purchase and devise and the right of inheritance to all issue born subsequent

to such denization. The substantial rights acquired by a person having declared his intention to become a citizen of the United States are also to acquire lands and hold the same under the laws of the United States, and although there might not be any distinction between the rights of issue born prior and that subsequent to the time such declaration of intention was made, should such person die leaving issue not having taken out his final naturalization papers, yet there is no reason why the rule of common law might not be followed in that particular if the matter should come before the United States Courts and thus render the similarity between this state and that of denization more complete and indeed almost identical. At any rate it seems to counsel that there is a much more striking similarity between the status of a person, who has declared his intention to become a citizen of the United States and a denizen at common law, than there is between citizenship acquired under the laws of Congress and denization. But if we are to give the effect to the rights and privileges acquired by having declared his intention to become a citizen of the United States to this claimant, which is given to a denizen under the English law, then it would seem that this Court must hold that he is a citizen for the purposes of this act under the well-settled policy of this Government in the administration of its Internal Affairs, or, at least, hold that naturalization retroacts to the time of such declaration of intention in order to preserve the substantial rights acquired under such declaration.

It is further suggested, but not as a contention, under the last line of argument, although somewhat analogous to it, that the words, "citizens of the United States," used in this law, should be construed as meaning "inhabitants" and "residents" as well as technical citizens of the United States. For every Indian depredation law from the foun-

dation of the Government down to the law now under consideration, provided for indemnity for property destroyed by Indians in amity with the United States, belonging to any citizen or inhabitant of the United States (Rec., p. 5), and it is a well-settled rule of statutory construction, which needs no citation of authorities to prove, that all laws *in pari materia* should be construed together. And it may be reasonably supposed that Congress intended to give to this remedial statute a sufficient scope to cover all treaty obligations and all obligations arising under prior acts of Congress. It, therefore, certainly would not be a vicious construction of the words, "citizens of the United States," to construe them broad enough to include inhabitants and residents for the purposes of this law, since to do so would be in furtherance of the remedy sought to be given and in harmony with prior existing laws *in pari materia*.

True, the words, "citizens of the United States" have a well-defined technical meaning in law, but it is equally as true that they have a common meaning broad enough to cover domiciles, residents and inhabitants and it is within the province of this Court to give these words their common meaning, if it is of the opinion that such a construction is the intent of Congress.

In a political sense the words, "citizens of the United States," unquestionably has this technical meaning, but even courts have recognized its common meaning, as in the case of Riswick *vs.* Davis *et al.* (7 Md., p. 93); Field *et al. vs.* Anderson (7 Md., p. 209), where it was held that a resident alien who had not declared his intention to become a citizen of the United States, and was entitled to no political rights under the law of the State, was still a "citizen," within the meaning of the attachment laws of that State against "absconding citizens." It is, therefore, urged that if this Court concludes that it was the intention of Congress to give

this law a retrospective effect, requiring claimants to be citizens of the United States at the time of the loss, then in view of the prior existing laws *in pari materia*, it should construe the words, "citizens of the United States," in this law broad enough to cover residents and inhabitants.

If the foregoing argument is well taken, then,—

1. The Indian depredation law of March 3, 1891 (26 Stats. L., p. 851) is not retrospective.

2. This claimant has a vested right under the treaties with the Ute Indians, and the Court of Claims has jurisdiction in this case under the second or treaty paragraph of this law.

3. The naturalization laws of Congress are retrospective.

4. Claimant has a right to recover in this case by reason of his having declared his intention of becoming a citizen of the United States at the date of this loss, purely because of the effect of such declaration of intention or, if not, then because citizenship retroacts to the time of such declaration.

5. If this Court construes this law to require claimants to be citizens of the United States, at the date of the loss, then it should construe the words, "citizens of the United States," therein broad enough to include residents and inhabitants.

JOHN WHARTON CLARK,
Attorney for Claimant.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

BENJAMIN H. JOHNSON, APPELLANT,
v.
THE UNITED STATES AND THE UTE Tribe or Nation of Indians. } No. 325.

BRIEF AND ARGUMENT OF CHARLES B. HOWRY, ASSISTANT ATTORNEY-GENERAL, FOR APPELLEES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

BENJAMIN H. JOHNSON, APPELLANT,
v.
THE UNITED STATES AND THE UTE Tribe or Nation of Indians, appellees. } No. 325.

BRIEF OF CHARLES B. HOWRY, ASSISTANT ATTORNEY-GENERAL, FOR APPELLEES.

THE CASE.

Under the act of Congress entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, Benjamin H. Johnson filed his petition in the United States Court of Claims against the United States and the Ute Indians, alleging that on or about the 10th day of June, 1866, the property described in the petition, amounting in value to $4,015, was taken from and out of his possession without his consent by Indians of a band, tribe, or nation in amity with the United States and known as the Ute Indians, without just cause or provocation on the

part of the owner, and that the same was never returned or paid for. It is stated in the petition that the claim was never presented to the Commissioner of Indian Affairs or to any agent or Department of the Government. The petition also shows on its face that the petitioner was not a citizen of the United States on or about the 10th day of June, 1866, the date of the loss, but was a citizen of the United States at the date of the passage of the *Indian Depredation Act of March 3, 1891* (26 Stat. L., chapter 533, p. 851), the petitioner "not having taken out his final citizenship papers until 1873."

The petitioner states in his pleading that in allowing claims for Indian depredations under the *Act of March 3, 1885*, chapter 341 (1 Sup. R. S., 2 ed., p. 913, note), that it was the practice of the Interior Department to interpret the words "citizens of the United States," therein used, as meaning only those who were citizens or had declared their intention to become citizens at the time the depredations were committed, "and such citizenship was found when neither alleged nor testified to where the contrary did not appear."

The United States and the Ute Indians, by and through the Assistant Attorney-General, charged by law with the defense of the cases arising under the act, moved the court at the December term, 1893, to dismiss the case for the reason that on the face of the petition itself it appeared that the claimant was not a citizen of the United States at the time of the commission of the alleged depredation, and that the court was therefore without jurisdiction to entertain the same. This motion was sustained and the cause dismissed for want of jurisdiction.

The sole question before the court for determination as I understand it and shall insist is: Whether under the act of Congress under which this suit has been brought an alien at the time of the depredation upon his property, but who subsequently became a citizen of the United States, can claim the benefit of the law as a citizen and is included within the meaning of the statute giving to citizens of the United States the right to bring suits for Indian depredations.

The *act of March 3, 1891*, chapter 538 (1 Supp. Rev. Stat., 2d ed., p. 913), provides:

> That in addition to the (1) jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:
>
> First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.
>
> Second. Such jurisdiction shall also extend to all cases which have been (2) examined and allowed by the Interior Department; and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes,

approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided.

Third. All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination.

This act authorized the Court of Claims to inquire into and adjudicate numerous cases then pending in the Interior Department and cases authorized to be examined there where there was an express treaty obligation for payment on behalf of citizens of the United States, but not otherwise, and included all cases which might be thereafter brought in the manner provided by the act. By this jurisdictional act the qualification of citizenship was made fundamental and became essential to recovery in every case.

In conferring the jurisdiction upon the Court of Claims to hear and determine "all claims for property of citizens of the United States taken or destroyed by Indians," Congress did not mean to give the court jurisdiction, and in fact did not confer the power on the court, to hear and determine the claims of persons not citizens at the time of the taking or destruction of the property, and the retrospective operation of the act in question, in this particular, is therefore denied.

In the presentation of this question to the Court of Claims it was suggested by counsel for the defense that the ambiguity of the language of the statute on this point was more apparent than real, and that the contention that the statute covered different periods of time with respect to the fundamental questions of citizenship and amity of the tribe doing the wrong was not tenable.

This view was accepted by the court in the case of *James S. Valk, surviving partner, etc.*, v. *The United States and the Rogue River Indians of Oregon*, where it is said:

> That from a casual reading of the statute the language on this point may seem ambiguous, but it is evident that the whole paragraph relates to but one period of time, and that period was when the depredations were committed. That it never has been questioned, and nobody can doubt that it was the amity of the band, tribe, or nation *at that time* which must be proved. The words "citizens of the United States" and "Indians belonging to any band, tribe, or nation in amity with the United States" are so closely connected in the same paragraph that they must refer to the same time. The status of both the Indians as to amity and the persons whose property was destroyed as to citizenship, both or neither, must be determined as of the time the destruction took place. Their rights and liabilities were fixed at that date, and could not be changed by their future acts. Indians could not avoid liability by subsequently becoming in amity, nor could aliens acquire new rights by subsequently becoming citizens. (28 C. Cls. R., p. 241.)

This reasoning, so clear and convincing, has been applied to the case under consideration, and was reaffirmed by the Court of Claims in the opinion which directed Johnson's Case to be dismissed.

The words conferring jurisdiction generally for "all claims for property of citizens" appear but once in the law, and that in the first paragraph, directing the court to inquire into and adjudicate the cases. From this language it would appear that the directions contained in the first paragraph of the law apply not only to cases

filed under the first paragraph but also to all the cases transferred from the Interior Department, as well as the cases which, under previous law, the Secretary of the Interior had the authority to examine. It can not well be claimed from a reading of the entire jurisdictional section of the statute that Congress intended that any but the claims of citizens of the United States at the time of the alleged depredations should be adjudicated.

In his brief the counsel for the claimant seeks to maintain the following propositions:

(1) That the Indian depredation law of March 3, 1891 (26 Stat. L., p. 851), so far as respects the question of citizenship of claimant, should have a prospective and not a retrospective effect, as given by the court below.

(2) That claimant is entitled to recover under the second jurisdictional paragraph, or treaty paragraph, of the law of March 3, 1891 (26 Stat. L., p. 851, par. 2), although not a citizen of the United States, because of the fourth section of the treaty with the Tabequache Ute Indians, which provides for indemnity to "white residents" as well as citizens of the United States. (Treaty of October 7, 1863, 13 Stat. L., p. 673.)

(3) That the laws governing citizenship have a retrospective effect in favor of the citizen, covering all defects which exist on account of his prior alienage, and placing him in the same position as though a natural born citizen of the United States.

(4) That claimant should recover because he had declared his intention to become a citizen prior to his loss in 1866, and was, therefore, a citizen of the United States under the intendment of the law of March 3, 1891.

The first, third, and fourth of these propositions will be hereafter particularly considered in connection with the question whether the Indian depredation act of March 3, 1891, is prospective or retrospective, and the second proposition in considering the treaty between the United States and the defendant tribe of Indians.

The claimant alleges that it is a primary rule of statutory construction that remedial statutes should be interpreted most liberally in favor of the party in whose favor the remedy is given, and he adds: "Therefore the same liberal rule of construction can not be applied to the defendant Indians that must be applied to claimants." The remedy here, however, is against the Government as well as the defendant Indians, and the doctrine contended for is not applicable. The Government is entitled to have the act strictly construed, the general rule being that all statutes giving the right of action against the Government are to be construed strictly. In Endlich on the Interpretation of Statutes, page 233, it is said:

> It has been held that statutes allowing suits against a State or its governors are to be strictly construed, and the right conferred by them is to be confined to those *clearly* intended to enjoy it, and not extended, e. g., to aliens or assignees of aliens.

The court in the case of *Rose* v. *The Governor* (24 Tex., 504), announced the principle thus:

> The right to sue the governor or the State is a matter of favor conferred by the State in derogation of that immunity which every sovereign enjoys; and we think that statutes conferring such privileges

> should be construed with strictness, so as to extend the right only to those by whom it was *clearly* intended that it should be enjoyed.

The principle of the common law that the Government can not be sued in actions sounding in tort has again and again been held. (*Johnson* v. *United States*, 2 C. Cls. R., p. 415.) It ought to follow that where the doors of the court have been opened by Congress for the tortious acts of others and the Government made responsible for wrongs not committed by its own people, statutes making the Government liable as an act of grace and favor and conferring privileges of suit should be strictly construed.

There does not seem to be anything in the case of *United States* v. *Klein* (13 Wall., 144), cited by counsel, against the proposition here submitted for the strict construction of the act under which the case at bar is brought. This court said, in considering a proviso relating to suits for the proceeds of abandoned and captured property, that the argument that suit against the Government was a matter of favor was not entirely accurate, and that it was as much the duty of the Government as of individuals to fulfill its obligations. There were previous obligations of the Government which the claimant in that case had brought his suit to enforce. Here there was no obligation on the part of the Government to ever pay the claimant. The entire statute is a matter of grace and favor, and should be construed not as an ordinary remedial statute but in such manner that every person seeking its benefits shall bring himself strictly within the letter of the law.

RETROSPECTIVE FEATURES OF THE ACT OF MARCH 3, 1891, CONSIDERED.

The first proposition that the claimant in this case seeks to maintain is "that the Indian Depredation Law of March 3, 1891, so far as respects the citizenship of claimants, should have a prospective and not a retrospective effect, as given by the court below" (see brief of claimant's counsel, page 3), and as a corollary from this (see *Id.*, p. 14), "that the condition of citizenship be construed to attach to this claimant at no point of time anterior to the time when the law of March, 1891, went into effect."

A retrospective statute is one that looks backward and has reference to a state of things existing before the act in question. (2 Bouvier's Law Dic., 588.) It is made to affect acts or facts transpiring or rights accruing before it came into force. (Black's Law Dic., 956.) A law is said to be prospective (as opposed to retrospective) when it is applicable only to cases which shall arise after its enactment. (*Id.*)

It is a sound rule of construction that a statute should have a prospective operation only unless its terms show a legislative intention that it should operate retrospectively. (Cooley's Const. Lim., 6th ed. (1890), 455.) It were useless to multiply authorities on this point. It is undisputed and the settled doctrine of this court. (*United States* v. *Heth*, 3 Cranch, 398, 413; *Murray* v. *Gibson*, 15 How., 421, 423; *McEwen* v. *Den.*, 24 How., 242, 244; *Harvey* v. *Tyler*, 2 Wall., 328, 347; *Sohn* v. *Waterson*, 17 Wall., 597, 599; *Twenty Per Cent Cases*, 20 Wall., 179, 187; *Chew Heong* v. *United States*, 112 U. S., 536.)

But the statute under consideration does clearly and unmistakably show the intention of Congress to make it operate retrospectively as to the cause of action. The classes of claims over which the act gives the Court of Claims jurisdiction are set forth in the first and second clauses of section first of the act of March 3, 1891.

It will be noticed by the court that the claims mentioned in these sections or paragraphs are, first, for property "taken or destroyed," using the past tense, not for property that might be thereafter taken or destroyed; and, second, to cases which "have been examined and allowed" and such as "were authorized to be examined" under the act of 1885. No reference in the act is made to matters *in futuro*. So far from it, it is expressly provided "that all claims *existing* at the time of the taking effect of the act" shall be presented to the court within a certain time or be forever barred, and "that no suit or proceeding shall be allowed under this act for depredations which shall be committed *after* the passage thereof." (See provisos 2 and 3 of section 2.) No provision is made for any claims not existing at the time of the passage of the act and none for claims on account of depredations committed after its passage.

In no statute has the legislature more clearly signified its intention that it should operate retrospectively than it has done in this act.

The occasion of the enactment of a law may be looked to to assist the court in determining its character as retrospective or prospective. (*People* v. *Supts. Columbia Co.*, 43 N. Y., 130; *People* v. *Board of Supervisors of Essex County*, 70 N. Y., 228, 229.) It was well known

to Congress when this law was passed that the Indians had for years, in different parts of the country, been committing depredations upon the citizens and inhabitants of the United States by taking or destroying their property. The acts of May 19, 1796, March 3, 1799, March 3, 1802, March 3, 1885, severally refer to such depredations. Congress by the said acts made provision for such citizens or inhabitants, but by the act of March 3, 1891, it made provision for citizens only. The word "inhabitant," which would have included an alien, was then eliminated from the statute, showing its intention to exclude from its benefits any other persons than citizens.

The third proposition on behalf of the claimant which he seeks to maintain is "that the laws governing citizenship have a retrospective effect in favor of the citizen, covering all defects which exist on account of his prior alienage, and placing him in the same position as though a natural-born citizen of the United States." (See page 3 of brief.)

No authorities are cited by the claimant's counsel in support of this contention, and, in the broad terms in which it is stated, it is denied by the defendants. While the act of March 3, 1891, may have a retroactive effect in favor of a citizen whose property has been taken or destroyed by the Indians when he was a citizen, it has no retrospective effect in favor of a party who was an alien at the time of the depredation committed, but who subsequently became a citizen. We have already attempted to show that certain defects which existed on account of alienage are not removed by the subsequent acquisition of citizenship.

Nor do I agree that the act of 1891 is retrospective as to the condition of citizenship. It does not impair any rights the citizen had by reason of citizenship; nor does it affect any rights previously given to an alien. The act of June 30, 1834, was repealed as to the promise by the United States of eventual indemnification by the act of 1859. The petition of claimant alleges his loss as of June 10, 1866, at which time there was no promise to either citizens or aliens on the part of the United States to assume liability on account of Indian depredations. The claimant had no rights such as are given citizen claimants in the act of 1891, nor had citizens such rights before. The rights of those who were aliens at the time of their losses against Indian tribes are, as the rights of citizens were up to 1891, still inchoate and lacking a remedy and a forum for their enforcement.

The fourth proposition which the claimant seeks to maintain is, "That this claimant should recover in this case because he had declared his intention to become a citizen of the United States prior to his loss on June 10, 1866, and was therefore a citizen of the United States under the intendment of the law of March 3, 1891, giving the Court of Claims jurisdiction of Indian depredation cases."

The obvious intention of Congress in passing the act was to compensate in damages, commensurate with the loss sustained, *citizens* of the United States who had sustained losses of property by Indian depredations. The act has no reference whatever to the property of aliens.

When the language used in the statute is plain and unambiguous (as this is) a refusal to recognize its natural obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. (*Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S., 1, 36, 37.)

The act does not say "all claims of citizens of the United States for property," but does say "all claims for property of citizens of the United States," clearly meaning that the property itself of which the claimant was despoiled must, at the time of the depredation, have been the property of a citizen. This construction does no violence to its language and is in harmony with the manifest object of the statute.

The claimant in this case was not, according to his own admission, a citizen of the United States when the depredation was committed, and ~~there is no proof in the record~~ not clearly alleged that he was a citizen of the United States at the time of preferring his claim and instituting this proceeding. It is true that he alleges in his petition that he was then a citizen, but to have acquired citizenship by naturalization under the act of Congress was an indispensable prerequisite, and this is not susceptible of any other than record proof. The admission to naturalization is in its nature a judgment of the court and must be proved like other judgments by the production of the record itself, or by an office copy. (1 Greenl. Ev., sec. 86, 501.) Parol evidence is inadmissible to prove the fact. (*Pemberton* v. *Swinburne*, 20 W. Va., 89.) Not having shown that he has been denationalized and become a citizen his alienage

is presumed to have continued. (*Hauenstein* v. *Lynham* 100 U. S., 483; *Bode* v. *Trimmer*, 82 Calif., 513; *Jackson* v. *Wright*, 4 Johns. (N. Y.), 75.)

We have already endeavored to show that the primary declaration to become a citizen confers none of the rights of citizenship, and that when citizenship is perfected by taking the final oath it has no relation back to the beginning.

In *Dryden* v. *Swinburne* (20 W. Va., 89), where the declaration was made in 1852 and naturalization acquired in 1866, it was contended that the declaration of intention under the act of Congress to become a citizen confers an incipient right of citizenship, which, when perfected by taking a final oath, relates back to the beginning. The court held that this novel position was not sustained by any authority, and that the party is a citizen only from the time of taking the final oath.

Naturalization has no retroactive effect that will enable the person naturalized to take, as heir, lands the descent of which was cast before his admission to citizenship (*Vaux* v. *Nesbit*, 1 McCord, ch. (S. C.) 372; *People* v. *Conklin*, 2 Hill (N. Y.), 67; *Heeney* v. *Trustees, etc.*, 33 Barb. (N. Y.), 360); or vest an estate (*Keenan* v. *Keenan*, 7 Rich. (S. C.), 345).

Unless naturalization is complete, and final papers issued it confers no right of inheritance. A mere declaration of intention to be a citizen is not sufficient. (*McDaniel* v. *Richards*, 1 McCord (S. C.), 187; *City of Minneapolis* v. *Reum*, 56 Fed. R., 576, decided in 1893

TREATY BETWEEN THE UNITED STATES AND THE DEFENDANT TRIBE OF INDIANS.

It is contended, in the second place, that the claimant has "a vested right" under the treaty of October, 1863 (13 Stat. L., p. 673), between the United States and the defendant tribe; and that under what the brief for Johnson calls the second jurisdictional or treaty paragraph of the law under consideration the Court of Claims has jurisdiction of the claim, and that this court can not so construe the law as to take away or impair what the counsel for the claimant is pleased to designate a "vested right."

The *Act of March 3, 1885* (23 Stat. L., 376), referred to in the second paragraph of the law conferring the jurisdiction, was a general appropriation act of Congress. It appropriated $10,000 for the investigation of "certain" Indian depredation claims and directed the Secretary to cause a complete list of all claims on file at the time of the passage of the act in the Interior Department approved in whole or in part and then unpaid; and all claims then pending, but not examined, *on behalf of citizens of the United States* on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between the tribe and the United States, including the name and address of the claimants, the date of the alleged depredations, by what tribe committed, the date of examination and approval, *with a reference to the date and clause of the treaty creating the obligation for payment*, to be made and presented to Congress at the next regular session. The Secretary was further

authorized and empowered before making such report to cause additional investigation to be made and further testimony to be taken as he might deem necessary to enable him to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid and by what tribe such depredations were committed. His report was to include his determination upon each claim, together with the names and residence of witnesses and the testimony of each witness, and also what funds were existing or to be derived by reason of treaty or other obligation *out of which the same should be paid*.

The act of 1885 was a departure from the act of 1872 with respect to the investigation and allowance of claims for Indian depredations. The act of 1872, as well as all acts previous to that time relating to indemnity for Indian depredations, provided for indemnity, for property destroyed by Indians, to any "citizens or inhabitant" of the United States. (Act of 1796, May 19, ch. 30, sec. 14, 1 Stat. L., 472; act of 1799, March 3, ch. 46, sec. 14, 1 Stat. L., 747; act of 1802, March 30, ch. 13, sec. 14, 2 Stat. L., 143; act of 1834, June 30, ch. 161, sec. 17, 4 Stat. L., 731; Rev. Stat., sec. 2156.)

The Secretary of the Interior, construing the act in accordance with the evident intention of Congress to limit allowances in such cases to citizens of the United States at the time the depredations were committed, confined his examinations to the claims of citizens. No allowances were made for anybody else but citizens. It became the established practice of the Department to find in allowed cases that the claimants were citizens at the time of the commission of the depredations. The claim

of Johnson, even if it had been filed, could not have been examined and allowed, as the Secretary was without jurisdiction. Johnson was not a citizen within the meaning of the act of 1885, and he accepted the interpretation of the Interior Department in not asking for the investigation of his claim. The property taken from him, if taken at all, was the property of an alien, and therefore not the subject of consideration by Congress.

The act under which suit was brought by him adopted the language of the act of 1885, to which it refers. That Congress intended to use in the act of 1891 the words "citizens of the United States" in the sense that had been given by the Interior Department to the same words in the act of 1885 must be presumed by the courts. The court below took that view of it.

It is a well-recognized principle of construction that courts will not interfere by transposing phrases and clauses to change the meaning of a sentence even where it may be plausibly argued that such a change in the meaning is demanded by the general intent of the law, which is not the case in the act under consideration.

If the claimant in the case at bar was not a citizen at the time the depredation was committed, then the property taken or destroyed was not "the property of citizens of the United States," but was the property of an alien; and no cause of action exists.

If we look to the general intent and effect of the statute the conclusion must be the same. If the qualification of citizenship means anything it means that the claimants who take advantage of its provisions must

have been citizens when they sustained the loss for which they claim indemnity. Suppose it be assumed, for the sake of argument, that the law does not mean citizenship at the time of the depredation; to what time, then, shall we refer the requirement of citizenship? It is urged that Congress meant the words to include all who were citizens at the time of the passage of the act. But there is nothing in the act itself to warrant such an assumption. Suppose a man became a citizen on the 4th of March, 1891. Such a man would be as much entitled to relief as one who became a citizen on the 2d of March. It would be difficult to prove the contrary by an examination of the statute. If, then, it be not the date of the passage of the act, is it the date when suit is brought? But suppose the petition failed to aver citizenship, the Court of Claims could allow amendments to petitions any time before judgment, and one who was not a citizen might after becoming such have amended his petition in time to receive judgment as a citizen.

But suppose amendments to petitions were things to be denied. The act of 1891 gave three years to all claimants within which to file their petitions. An alien at the date of the passage of the act would have had ample time to make his preliminary application, await the required two years, complete his naturalization, and file his suit as a citizen long before the time expired during which new claims might be brought. In either case any limitation intended by the word "citizen" would be defeated, and the phrase in the law would have no meaning or effect at all.

It was the intention of Congress that the owner of the property should be a citizen. A large number of Indian depredation claims are very old, and many of them had passed into other hands than those of the original owner of the property taken or destroyed. It was manifestly the intention of Congress that the validity of each claim should be made to depend upon the citizenship of the parties at the time of the losses.

The provision for the indemnity of inhabitants, which had appeared in every Indian depredation act since 1796, was omitted apparently *ex industria* from the act of 1885 and subsequent acts.

It is claimed, however, that the condition of citizenship as a requisite to recovery, under the second or treaty paragraph, was not imposed by the act of March 3, 1891; that his claim may be examined under the treaty paragraph of the act of March 3, 1891, upon the ground that the Utah tribe of Indians were chargeable for the depredation under the treaty of March 25, 1864 (13 Stat. L., 674), the liability being rested upon the sixth article of that treaty. The brief for the claimant contends under this heading that inasmuch as this treaty is a solemn contract to pay the claimant as a "white resident" for the depredation, this contract can not be impaired by subsequent legislation, and that it needs no act of the Legislature to make this treaty operative, because it points out the very funds from which the claim is to be paid.

The claimant does not sue as a "white resident" of Utah. He sues as a citizen. He claims nothing in his pleading except the rights of a citizen.

If the Utah treaty of 1864 needs no act of the Legislature to make its provisions operative for the benefit of the claimant, as he alleges, then the claimant has not made it clear why he seeks to come in under the jurisdictional statute of 1891. An examination of the treaty between the United States and the Utah Indians referred to will show that the friendship established between the two parties to the treaty was not to be interrupted by the misconduct of individuals, but for injuries done complaints were to be made by the party injured to the superintendent or agent of Indian affairs or other person appointed by the President. Under the treaty the chiefs of the tribe assumed the duty of delivering up the persons against whom such complaints were made at the instance of white men. The chiefs also assumed the duty of exerting themselves to recover the property of white people taken, but only upon the condition that complaints were made through the proper officers of the United States to the chiefs of the tribe that property had been taken. For the property stolen, but not recovered, payment was to be reserved from the annuities which the band should receive under the treaty upon sufficient proof of the fact. It nowhere appears that the claimant in this case ever made any complaint to the Indian agent, superintendent, or other person appointed by the President, or that the Utahs ever had the opportunity of restoring the property. Before the annuities provided for by the treaty could be resorted to for the payment of property taken from the claimant the tribe must have had some sort of notice to the end that they might comply with

the provisions of the treaty which gave the chiefs an opportunity to deliver up the offenders and restore the property.

Article 8 of the treaty provided for annuities for the period of ten years. These annuities, the presumption is, have long since been paid over, and the treaty has been executed. There is nothing due the Utahs by its terms and nothing in the Treasury of the United States on account of its provisions.

It will be conceded that the courts of the United States were not open for the recovery of any of the annuities provided for by the treaty of 1864, either to the citizen or to the white resident, under any law until the passage of the act of 1891. There was a right of investigation of Johnson's claim under the act of 1872, but nothing more. When the act of 1885 superseded the act of 1872, the annuities provided for in the Utah treaty of 1864 had been paid over. Even if the Secretary of the Interior could have investigated the same under the act of 1885 as the claim of a citizen he could not have reported to Congress that there were any funds for the payment of the demand, and it is doubtful whether the claim could have been allowed on this point even in favor of citizens. The appeal to the proposition that "a treaty is the law of the land" (*Foster* v. *Neilson*, 2 Pet., 253), and that the Utah treaty is "self-operative, needing no act of Congress to execute it," and is consequently a rule of action binding on the court to carry out its provisions for the benefit of claimant as a white resident of Utah, is out of place, inasmuch as the court is construing, on appeal, the right of claimant to bring his suit as a citizen

of the United States under an act of Congress, and the court can not be called upon to interpret the rights of claimant under a treaty as a white resident where no statute has directed the consideration of any such case.

The Utah treaty of 1864 does not *proprio vigore* provide the means and methods of taking the annuities for the payment of depredations of the offending members of that tribe. It only says the annuities may be reserved for the purpose. But they were not reserved, and to get at them and cause them to be reserved so that a citizen or a white resident could enforce his demand it was necessary for Congress at some time to act upon and execute the treaty before the annuities were paid, at all events. The treaty, therefore, in providing for the payment of depredations was never "self-operative," and only became so upon certain conditions possibly in favor of citizens of the United States under the act of 1891.

Our Constitution declares a treaty to be the law of the land. It is, secondly, to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform any particular act, the treaty addresses itself to the political, not the judicial, department; and the Legislature must execute the contract before it can become a rule for the court. (*Foster* v. *Neilson, supra.*)

Johnson's allegation that the court should entertain his petition because, as he now says in his brief (but not in his petition), he was a white resident of Utah certainly

does not include a claim which could only be asserted by disregarding the plain provision of the treaty under which he claims. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial. The presumption is inadmissible that Congress by the act of 1891 sought to provide for the payment of claims against Indians under treaty stipulations by authorizing the treaty stipulations in question to be overthrown or disregarded.

It is respectfully asked that the judgment of the court below dismissing this case for want of jurisdiction be affirmed.

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